In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-416

BERNARD MOSKOWITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, a pharmacist, contends that evidence of another crime was improperly received into evidence to show that he knew that certain prescriptions filled by him were forgeries.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted on two counts[1] of having knowingly and intentionally distributed dilaudid, a schedule II narcotic, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of eighteen months' imprisonment, to be followed by a special parole term of three years. Imposition of all but six months of the sentence was subsequently suspended, and petitioner was placed on two years' probation to begin at the time of his discharge. The court of appeals affirmed *per curiam* (Pet. App. 1).

[1]Count III of the indictment, alleging a violation of 21 U.S.C. 843 (a)(3), was dismissed by the trial court at the close of the government's case.

The evidence at trial showed that on October 13 and 19, 1972, petitioner, a Miami pharmacist, filled a dilaudid (a narcotic analgesic) prescription for Fred Bitz, a narcotics addict who had written the prescription himself using a form pad stolen from a Miami clinic (Tr. 37-38, 50-51, 82). Before filling the October 13 prescription, petitioner telephoned the clinic from which the pad had been stolen and was told that the doctor whose name Bitz had forged on the form had never worked at the clinic. Petitioner nonetheless filled the prescription, as well as a similar prescription given to him by Bitz on October 19 (Tr. 50-53, 102).

The pattern of petitioner's dealings with Bitz also demonstrated that petitioner had good reason to believe that the prescriptions given to him by Bitz had been forged. Between early 1972 and May 1973, petitioner filled for Bitz approximately sixty forged prescriptions for such controlled substances as dilaudid, morphine sulfate, qualude, and tuinal (Tr. 38-39, 42-43, 45-46, 58). Petitioner sometimes filled Bitz's prescriptions as often as three or four times a week (Tr. 45). On at least one occasion besides October 13, 1972, petitioner filled a prescription for Bitz after having determined by telephone that it was fraudulent (Tr. 54-56).

On direct examination, Bitz testified that in November 1973 petitioner had extorted $1,400 from him in exchange for returning forged prescription forms which had been retained in the pharmacy's files (Tr. 70-72). Petitioner denied that he had ever extorted money from Bitz (Tr. 275-276, 278-283). In rebuttal, the government played for the jury a tape recording of the extortion payoff (Gov. Exh. 8), which had been made with Bitz' consent (Tr. 345-346).

Petitioner's contention that the trial court erred in permitting evidence to be introduced concerning the ex-

tortion attempt is without merit. Evidence of other crimes may be introduced to established that a defendant possessed the requisite knowledge to commit an offense or to demonstrate the defendant's *modus operandi*. *E.g., United States* v. *Goodwin*, 470 F.2d 893, 899 (C.A. 5), certiorari denied, 411 U.S. 969; see also *United States* v. *Pennick*, 500 F.2d 184, 187 (C.A. 10), certiorari denied, 419 U.S. 1051; *United States* v. *Rodriguez*, 474 F.2d 587, 590 (C.A. 5); *Reid* v. *United States*, 334 F.2d 915, 918 (C.A. 9). Whether the probative value of such evidence is outweighed by its prejudice to the defendant is a determination properly left to the sound discretion of the trial judge. See, *e.g., United States* v. *Rodriguez, supra*, 474 F.2d at 590.

The court did not abuse its discretion in the present case in allowing the government to introduce evidence of petitioner's extortion of money from Bitz. The extortion was closely related to and grew out of petitioner's filling of forged prescriptions for Bitz. Standing alone, the extortion did not prove that petitioner knew that the prescriptions specified in the indictment were forgeries, but it constituted a significant element in the pattern of conduct which cumulatively demonstrated that fact.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1975.

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[2]Petitioner's reliance on *Boyd* v. *United States*, 142 U.S. 450, and *Michelson* v. *United States*, 335 U.S. 469, is misplaced. In *Boyd*, this Court reversed the defendant's conviction because the trial court had permitted testimony to be received concerning crimes which, in contrast to the situation here, had no bearing on the offense charged. In *Michelson*, this Court held that a character witness may be cross-examined concerning his knowledge of the accused's criminal record.